DIVISION IV

CA05-1047

September 20, 2006

PRO TRANSPORTATION, INC. APPELLANT	AN APPEAL FROM PULASKI COUNTY CIRCUIT COURT
v.	[No. CV 03-5544]
VOLVO TRUCKS NORTH AMERICA, INC. and VOLVO TRUCK CORPORATION APPELLEES	HONORABLE CHRIS PIAZZA CIRCUIT JUDGE APPEAL DISMISSED

JOHN MAUZY PITTMAN, Chief Judge

Appellant Pro Transportation, Inc. (Pro), brings this appeal from a judgment entered on a jury verdict in favor of appellees Volvo Trucks North America, Inc., and Volvo Trucks Corporation (collectively, Volvo) and the denial of its motion for a new trial. We cannot reach the merits of this case because the appeal is not from a final, appealable order as required by Ark. R. App. P. – Civ. 2(a) and Ark. R. Civ. P. 54(b). We therefore dismiss the appeal for lack of finality.

Pro is a long-haul trucking company based in Arkansas. Volvo designs and manufactures trucks and engines. Between 1999 and 2001, Volvo supplied Pro with a number of trucks with model VED-12 C engines. Pro alleged that it had some issues with non-piston/liner components, *e.g.*, fuel-injector cups, valves, turbo-chargers, and other components. After a period of negotiations, Pro and Volvo executed a confidential settlement and release (the "settlement/release") on June 12, 2002. The settlement/release called for the payment of a certain sum of money by Volvo and an extended service program on those components in exchange for Pro's release of all claims, present and future.

On May 13, 2003, Pro filed suit against Volvo and the dealer, University Truck Center, Inc., alleging causes of action based on fraud, misrepresentation, negligence, breach of express warranty, breach of warranty of fitness for a particular purpose, and breach of warranty of merchantability. The complaint alleged that, after execution of the settlement/release, Pro began experiencing problems caused by the piston/liner components, something not covered by the settlement/release, and that Volvo knew of these problems and concealed them from their customers such as Pro. The complaint alleged that these problems with the piston/liner components caused Pro to suffer lost profits due to increased repair time and costs, loss of value of the trucks, and increased driver costs. The complaint also sought a declaratory judgment that, based on Volvo's concealment of the problems with the piston/liner components, the settlement/release was null and void. Volvo answered, denying the material allegations of the complaint.

By order entered on November 1, 2004, the trial court bifurcated the trial into two stages: first, whether Volvo procured the settlement/release by fraud and, second, the issue of liability and damages caused by the piston/liner failures. The ruling was based on our supreme court's decision in *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 834 S.W.2d 136 (1992), holding that it was an abuse of discretion to try products-liability claims with a claim for breach of a settlement contract involving settlement of the same products claims.

The piston/liner case on liability and damages was tried to a jury January 10-21, 2005. Prior to the case being submitted to the jury, Pro dismissed via voluntary nonsuit all claims against University Truck Center. It also nonsuited its breach-of-warranty and negligence claims against Volvo. The jury returned a verdict in favor of Volvo and judgment was entered on the jury verdict. Pro filed a timely motion for new trial that the trial court denied. This appeal followed.

The question of whether an order is final and subject to appeal is a jurisdictional question, which we will raise on our own even if the parties do not. *Epting v. Precision Paint & Glass, Inc.*, 353 Ark. 84, 110 S.W.3d 747 (2003). When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the trial court may direct entry of a final judgment as to one or more but fewer than all of the claims only upon an express determination, supported by specific factual findings, that there is no just reason for delay, and upon an express direction for the entry of judgment. Ark. R. Civ. P. 54(b)(1). In the event the court so finds, it shall execute a Rule 54(b) certificate and set forth the factual findings upon which the determination to enter judgment as final is based. *See id.*

The supreme court has held that a party that has several claims against another party may not take a voluntary nonsuit of one claim and appeal an adverse judgment as to the other claims when it is clear that the intent is to refile the nonsuited claim and thus give rise to the possibility of piecemeal appeals. *See Haile v. Arkansas Power & Light Co.*, 322 Ark. 29, 907 S.W.2d 122 (1995); *Ratzlaff v. Franz Foods of Ark.*, 255 Ark. 373, 500 S.W.2d 379 (1973). *See also Driggers v. Locke*, 323 Ark. 63, 913 S.W.2d 269 (1996). This is so because a voluntary nonsuit or dismissal leaves the plaintiff free to refile the claim, assuming there has been no previous dismissal. *Haile*, *supra*; Ark. R. Civ. P. 41(a). The above cases were ones where partial summary judgment was granted and the plaintiff attempted to take nonsuits as to the remaining claims in order to appeal. However, there is no logical reason why the same reasoning should not apply in this situation where the case has been tried and certain claims nonsuited prior to submission to the jury. *See John Cheeseman Trucking, Inc. v. Dougan*, 305 Ark. 49, 805 S.W.2d 69 (1991) (holding that appeal from jury verdict on liability was not final where issue of damages and other claims remained to be tried).

Here, Pro has taken a nonsuit on its breach of warranty and negligence claims. Because the nonsuited claims may be refiled, this is an interlocutory appeal that we have no authority to entertain under Rule 2(a). Accordingly, we have no choice but to dismiss this appeal.

Dismissed.

GLOVER, J., agrees.

GLADWIN, J., concurs.

ROBERT J. GLADWIN, Judge, concurring. I concur with the majority because I believe the standard set by the supreme court requires that we dismiss the appeal. I write separately however, because I believe that this case exemplifies an absurd application of Ark. R. Civ. P. Rule 54(b).

The question of whether an order is final and subject to appeal is a jurisdictional question that we will raise on our own even if the parties do not. *Epting v. Precision Paint & Glass, Inc*. 353 Ark. 84, 110 S.W.3d 747 (2003). The supreme court has held that a party that has several claims against another party may not take a voluntary non-suit of one claim and appeal an adverse judgment as to the other claims when it is clear that the intent is to re-file the non-suited claim and thus give rise to the possibility of piece-meal appeals. *See Haile v. Ark. Power & Light Co.*, 322 Ark. 29, 907 S.W.2d 122 (1995). I submit that in the present case it is far from clear that the appellant's intent is to re-file the non-suited claim. Both parties were represented by extremely competent counsel. Prior to the case being submitted to the jury, appellant's counsel made the decision to dismiss all claims against University Truck Center and the breach-of-warranty claims against Volvo. This was a strategic trial decision by appellant's counsel. We can speculate why this decision was made, but it is certainly not clear that appellant's intent was to re-file the claim. I submit that it would be

clearer for appellees to raise the affirmative defenses of res judicata and collateral estoppel, arguing both claim and issue preclusion, if appellant attempted to re-file.

I have found no Arkansas cases citing rule 54(b) following a jury trial. All of the cases found arise from motions for summary judgment. It is absurd to believe that appellant would take discovery, prepare for a trial, try the case to a jury verdict, appeal to our court, and conduct oral argument with the idea that it would go back and re-file a claim that was dismissed during trial. The supreme court has stated that a purpose of Rule 54(b) is to avoid the possibility of piece-meal appeals. *See Haile*, *supra*. This case created the exact piece-meal appeal that we should avoid. Trial counsel throughout Arkansas routinely non-suit claims before issues are submitted to juries. Based upon the current interpretation of Rule 54(b), it appears that they should dismiss with prejudice those claims if they anticipate the possibility of appeal.